

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>GATE GOURMET, INC.</b>	:	SMALL CLAIMS
<b>F/K/A DOBBS INTERNATIONAL SERVICES, INC.</b>	:	DETERMINATION
	:	DTA NO. 819891
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Periods June 1, 1998 through February 29, 2000 and	:	
June 1, 2000 through February 28, 2002.	:	

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Petitioner, Gate Gourmet, Inc., f/k/a Dobbs International Services, Inc., 5100 Poplar Avenue, Memphis, Tennessee 38137, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1998 through February 29, 2000 and June 1, 2000 through February 28, 2002.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York on April 7, 2005 at 9:15 A.M. Petitioner appeared by S. Buxbaum and Company, CPA's, LLP (Stewart Buxbaum, CPA and Michael Buxbaum, CPA) and Alan Zipperstein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael J. Miller).

The final brief in this matter was filed by the September 30, 2005 due date and it is this date that commences the three-month period for the issuance of this determination.

## ***ISSUES***

I. Whether food that petitioner prepared for its customers was tangible personal property for sale, thus allowing petitioner to claim the utilities used to prepare said food as exempt from sales and use taxes pursuant to Tax Law § 1115(c)(1).

II. Whether the Division of Taxation's issuance of a Notice of Determination to petitioner to recover tax and interest which it believes that it erroneously refunded to petitioner pursuant to petitioner's application for refund lacked a reasonable and rational basis and should therefore be canceled as improper and defective.

## ***FINDINGS OF FACT***

1. Petitioner, Gate Gourmet, Inc., f/k/a Dobbs International Services, Inc., ("Gate Gourmet") is part of a large international corporation headquartered in Zurich, Switzerland. In a December 4, 2001 press release, Gate Gourmet is described in the following manner:

Gate Gourmet Division Americas,<sup>1</sup> formerly Dobbs International Services, operates 53 in-flight kitchens in the U.S. and 13 in Latin America. Its 11,500 employees produce over 100 million meals annually for more than 100 airline customers. Parent company Gate Gourmet International, based in Zurich, is a wholly-owned subsidiary of the Swissair Group which specializes in airline and airline related services. A world market leader in airline catering, Gate Gourmet International employs over 26,000 people worldwide in 34 countries on 6 continents and operates 154 in-flight kitchens.

2. Gate Gourmet operates two food service facilities in New York where it prepares meals for the airline industry. One of the food service facilities services LaGuardia Airport and the other one services John F. Kennedy International Airport. In a letter dated October 28, 2002,

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<sup>1</sup> It appears that petitioner Gate Gourmet, Inc. was, on some unknown date subsequent to the press release, the successor corporation to Gate Gourmet Division Americas.

Raymond H. Saunderson, an employee of Gate Gourmet, describes Gate Gourmet's basic operation in the following manner:

Gate Gourmet, Inc. ("GGI") . . . is an operator of airline food service facilities. GGI purchases, processes, cooks, bakes, assembles and packages food and beverage products which are sold to airline customers. The food and beverage products are delivered to and boarded on aircraft parked at the passengers' terminal gates at airports around the country.

GGI operates two such facilities (LaGuardia and JFK) in New York City. The major portion of these facilities is used in the processing, cooking, baking, chilling, assembling and packaging operations mentioned above, with only a nominal amount used for office and administrative purposes.

GGI customers are airlines. It sells food and beverage products to the airlines for in-flight passenger feeding. The food and beverage items are served to the passengers by the airline's employees. GGI does not sell to the general public. Its facilities are in fact closed to the general public. . . .

3. On or about December 31, 1999, petitioner filed an Application for Credit or Refund with the Division of Taxation ("Division") seeking a refund of sales tax in the amount of \$9,979.60 for the period June 1, 1998 through February 29, 2000. The Application for Credit or Refund indicated that "Refund claimed is based on New York Tax law [§]1115(c) and [§]1115(a)(12) which exempts utilities and equipment when used directly in the production of tangible personal property for sale. . . . This company uses utilities to process food product for sale." Petitioner attached to the Application for Credit or Refund copies of applicable utility bills from Con Edison, its supplier of utilities, and worksheets detailing its computation of the \$9,979.60 refund for sales taxes paid on utilities which it claims were exempt from sales tax on the basis that the utilities were used to produce tangible personal property for sale.

4. In March 2000, the Division issued a refund to petitioner in the sum of \$10,488.80, which amount included the requested refund of \$9,979.60 and interest of \$509.20. The Division

did not audit or examine this Application for Credit or Refund, electing instead to simply grant the refund as requested. This was not the first Application for Credit or Refund which petitioner had filed with the Division seeking a refund of the sales tax it had paid on utilities used to prepare food products. Petitioner has been filing similar, if not identical, applications for credit or refund with the Division for periods starting in the early to mid 1990s. The record herein does not disclose how many applications for credit or refund were filed by petitioner for these earlier periods; however, there is no dispute that the Division granted these earlier filed applications.

5. On February 21, 2002, petitioner filed another Application for Credit or Refund with the Division seeking a refund of \$33,808.50 for a portion of the sales tax paid on utilities used during the period June 1, 2000 through February 28, 2002. This Application for Credit or Refund, like the one submitted for the period June 1, 1998 through February 29, 2000, contained copies of utility bills from Con Edison and worksheets detailing the computation of the \$33,808.50 refund.

6. On September 4, 2002, the Division corresponded with petitioner concerning the \$33,808.50 refund application requesting that it provide: a) a list of production machinery and equipment; b) advertising material that petitioner provides to its customers; c) copies of invoices and contract agreements; d) a copy of a menu listing the meals that are available for purchase; and e) a detailed description of how the meals are packaged and delivered to the airlines.

7. After reviewing the information that petitioner submitted in response to the September 4, 2002 letter, the Division concluded that petitioner was not entitled to the \$33,808.50 refund as claimed in the application dated February 21, 2002. On January 6, 2003, the Division issued a letter to petitioner denying the \$33,808.50 refund claim in full for the following reasons:

The supporting documentation provided does not demonstrate that you are manufacturing tangible personal property for sale. Prepared meals

sold by you to the airline industry is considered to be food and drink sold in a manner described in section 1105(d)(1). Section 1105(d)(1) refers, in part, to sales “. . . of food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers. . . .” Therefore, the manufacturing exemption for sales tax paid on utilities is not applicable in this situation.

8. On February 18, 2003, the Division also issued a Notice of Determination to petitioner asserting that \$10,488.80 of tax was due, plus interest. A letter from the Division also accompanied the Notice of Determination and advised petitioner that “On 03/15/00, we mailed you a sales tax refund in error. In order to be eligible for a refund of sales tax paid on purchases of utilities, the utilities must be used directly and exclusively in the production of tangible personal property for sale.” The \$10,488.80 of tax asserted due in the notice represents the total of the tax (\$9,979.60) and interest (\$509.20) which the Division had previously refunded to petitioner on or about March 15, 2000 pursuant to the Application for Credit or Refund filed by petitioner on December 31, 1999 for the period June 1, 1998 through February 29, 2000.

9. Petitioner disagreed with the Division’s position that the food which it prepared was not tangible personal property for sale. Accordingly, it protested both the refund denial dated January 6, 2003 and the Notice of Determination dated February 18, 2003 and this small claims proceeding ultimately ensued.

10. The primary issue to be resolved in this controversy is whether the food which petitioner prepares for its airline customers is tangible personal property under Tax Law § 1105(a), as petitioner suggests, or whether petitioner is engaged in a food service business (a combination of food and service) as described in Tax Law § 1105(d). If the food that petitioner prepares is found to be tangible personal property, then there is no dispute that it is entitled to the production exemption contained in Tax Law § 1115(c)(1) for utilities used to prepare the food. If it is concluded that petitioner is providing a food service in the manner contemplated by Tax Law

§ 1105(d), and not producing tangible personal property for sale, then it is not entitled to the exemption allowed by Tax Law § 1115(c)(1). Accordingly, it is necessary to address in some detail the methods used by petitioner to prepare and distribute the food that it produces.

11. The October 28, 2002 letter from Gate Gourmet employee Raymond H. Saunderson referred to in Finding of Fact “2” contains the following detailed discussion of Gate Gourmet’s operations:

The airlines contract with GGI (Gate Gourmet, Inc.) to provide their in-flight passenger food and beverage needs on an airport by airport basis. The service is provided according to the airline’s specification. It covers all levels of service (first class, business class, tourist class on both international and domestic flights) as well as all times of service (breakfast, lunch, dinner and snack).

In order to meet customer needs, GGI must be prepared to perform, on a daily basis, functions such as: purchasing, receiving, inventorying, scheduling, processing, cooking, baking, chilling, packaging, and shipping operations.

An example might be the withdrawal of chicken from inventory, the thawing, the parting, skinning and de-boning of them. The breasts would be marinated in a mixture of vegetable oil, salt, white pepper and other seasonings that are made up according to the customer’s specifications. After draining, the chicken breasts would be placed on preheated grills in order to obtain a crisscross marking on one side. Then they are placed raw side down on sheetpans for further cooking. . . .

After cooking, the food must be immediately chilled down to a temperature ranging from 37 to 41 degrees, Fahrenheit. This is done in large chilling units that have the capacity to quick chill hundreds of these cooked items. The temperature range must be maintained throughout the plating, packing, delivery and boarding operations and in fact right up until the time of being reheated on board the aircraft by the flight attendant just prior to serving to the passenger.

The next step in the process is the plating/packing operation. This operation varies somewhat from airline to airline, depending on the level of service. Basically it entails the removal of the food from the chillers and the portioning of the food onto dishes. This involves the combining of the entrée along with any sauces and vegetables. The individual dishes are then wrapped with color-coded aluminum foil. The foil is generally

silver on one side and gold on the other. This enables the flight attendant to know the contents of the dish (meat, fish, pasta, etc.) without having to remove the foil wrapping.

Depending on the work schedule, the number and times of the flights for the day the individually wrapped dishes are then either put into holding coolers where they are held for later packing or they may go directly to packing. The packing consists of putting the individually wrapped dishes into the airline's food carrier unit and securing the unit. These units hold various numbers of dishes depending on the type of aircraft and the galley configuration. The packed and secured food carrier units are then moved to the truck loading dock for delivery to the aircraft.

At meal time the flight attendant will unpack the individually wrapped dishes and reheat the food in the on board microwave oven. The heated dishes will be placed on trays along with any roll, butter, dessert and silverware and served to the passenger. There are numerous variables to these processes depending on the airlines preferences but all include the above described basics. . . .

12. The record contains an undated article entitled "Dining in the sky" from Gate Gourmet's web page wherein it explains that airline catering is a complex undertaking and that "the tasks involved in providing food and drink for airline passengers extend well beyond the mere preparation of meals." The article further explains that food products are carefully selected (not all food is suitable for in-flight catering) and that gentle cooking processes are used to ensure freshness and retention of vitamins and nutrients. The article states that "Gate Gourmet employs chefs from all over the world" with expertise in preparing international and regional dishes and also the preparation of supplemental menus "to cater for ethnic or medical requirements."

After Gate Gourmet and the airline agree on the meal plans for various routes and classes on board, the plans are promptly forwarded to the appropriate flight kitchens to "ensure that customer-specific equipment and meal ingredients are all available." Prompt delivery of the food to the aircraft is the primary objective of Gate Gourmet's logistics experts and such things

as “flight delays and last-minute changes to passenger numbers and (often) aircraft locations are complicating factors which demand the utmost attention and flexibility. . . .” It is noted in the article that “Gate Gourmet provides catering for several thousand flights a day, supplying over 570,000 meals all over the world.”

The “Dining in the sky” article further informs the reader that “[W]hether travelers enjoy the catering on a flight does not depend on culinary skills alone. Equally important are the accessories: trays, cutlery, tableware and glasses, serviettes, salt cellars, refresher towels, menu cards, even cushions and blankets.”

13. The record contains eight handwritten “catering sales tickets” which petitioner generated for sales made to Polar Air with respect to flights departing from John F. Kennedy International Airport during the period April 4, 2002 to April 13, 2002. Each of the catering sales tickets contained a total for food and beverage sales, supply and service charges (delivery fees, warehouse fees, handling fees and overtime fees), port fees and the grand total. The following table reflects the total charges for each category as reflected on the eight catering sales tickets:

<b>Food &amp; Beverage</b>	<b>Supplies &amp; Service</b>	<b>Port Fees</b>	<b>Grand Total</b>
\$5,495.63	\$1,829.18	\$813.73	\$8,138.54
67.5%	22.5%	10%	100.0%

14. The record also contains a two-page computer printout entitled “Miscellaneous Airline Invoice Support” which details the food, beverage and other miscellaneous sales that petitioner made to Lan Chile for international flight number 5310 which departed from New York on seven different dates between April 1, 2002 and April 15, 2002. The total dollar amount of this two-page invoice is \$15,997.63 and included in this total was \$370.90 for both



wet and dry ice and \$316.99 for such items as toilet tissue, C-fold towels, dinner napkin, plastic glass and international garbage bags. This computer invoice, unlike the catering sales tickets for sales made to Polar Air, does not reflect any charges for supply and service fees or port fees. The record does not disclose if petitioner charged Lan Chile for supply and service fees and port fees which were billed on a separate invoice or whether these fees were not billed to Lan Chile at all. Although requested, petitioner did not provide the Division with copies of any contract agreements that it may have had with any of its airline customers, nor were any contract agreements entered in evidence in this proceeding.

15. The Division's letter dated September 4, 2002 requested information and supporting documentation only for the June 1, 2000 through February 28, 2002 period covered in petitioner's \$33,808.50 application for refund. The Division did not request or review any information and supporting documentation which pertained to the period for which it had issued the Notice of Determination (June 1, 1998 through February 29, 2000) seeking recovery of the refund which it believes it had erroneously given to petitioner. The Division's Notice of Determination was based entirely on the documents and information requested or obtained for the period June 1, 2000 to February 28, 2002. The Notice of Determination for the period June 1, 1998 through February 29, 2000 was issued under the assumption that petitioner's methods and operations for this period were substantially the same as the methods and operations used during the period which was examined by the Division, i.e., June 1, 2000 to February 28, 2002.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

16. Petitioner asserts that its unique business operations produce food which is tangible personal property for sale. Petitioner notes that, unlike a caterer who provides food in a heated state for immediate consumption, all of its foods are sold and delivered in a cold/chilled state

which is not ready for immediate consumption. Petitioner argues that its operation is similar to a kosher butcher where food is sold in an unheated state and in quantity.

The Division maintains that petitioner provides substantial services in conjunction with its sale of food to the airlines, thus requiring a finding that petitioner is engaged in a food service business under Tax Law § 1105(d) and is not selling food as tangible personal property. The Division asserts that the record contains substantial evidence to support that there are several important service components to petitioner's business operations and that these service elements establish that petitioner is providing a catering service to its airline customers.

17. Petitioner, citing *Chartair v. State Tax Commn.* (65 AD2d 44, 411 NYS 2d 41), maintains that the Division must first request and then examine a taxpayer's books and records before it can issue a Notice of Determination. Since the Division did not request or examine any books and records for the period covered in the Notice of Determination, petitioner argues that the Notice of Determination lacks a rational basis and must therefore be canceled. Relying on *Matter of Turner Construction v. State Tax Commn.* (57 AD2d 201, 394 NYS2d 78), petitioner contends that the change proposed by the Division in its Notice of Determination was not merely the correction of a clerical error, but instead a substantive change in judgement which requires a more explicit statutory grant of authority, an element which is, in petitioner's view, not present in this case.

The Division asserts that *Turner* and *Matter of Kensington Gate Owners, Inc.*, (Tax Appeals Tribunal, March 20, 2003), establish its right to issue a Notice of Determination to recover a refund which was erroneously granted and that petitioner has the burden of proof to show that the Notice of Determination is incorrect and that it is entitled to the refund. The Division notes that the refund applications for both periods in question were the same in form

and substance. The Division believes that there is a rational basis for the issuance of the Notice of Determination since both refund applications contain virtually identical descriptions of the nature of petitioner's usage of the utilities at issue, seek the same exemption from taxation and do not disclose that petitioner's methods and operations have changed in any material respect from one period to the other. The Division argues that its "like treatment of like refund applications based on the same exemptions filed by the same taxpayers is clearly not without a rational basis."

### ***CONCLUSIONS OF LAW***

A. As relevant to this proceeding, Tax Law § 1115(c)(1) provides that fuel, gas, electricity, refrigeration and steam are exempt from the New York State sales and use taxes when used directly and exclusively in the production for sale of tangible personal property. There is no dispute between the parties that if the food product which petitioner prepares for its airline customers is found to be tangible personal property for sale under Tax Law § 1105(a), then petitioner is eligible to claim the exemption under Tax Law § 1115(c)(1) and, if it is determined that the food product is part of a food service provided under Tax Law § 1105(d), then petitioner is not entitled to the Tax Law § 1115(c)(1) exemption.

B. Tax Law § 1105(a) provides for the imposition of a sales tax on the "receipts from every retail sale of tangible personal property. . . ." Tax Law § 1105(d)(i) imposes a tax on the sale of:

food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, or by caterers. . . .

(1) in all instances where the sale is for consumption on the premises where sold;

(2) in those instances where the vendor . . . after the delivery of the food or drink by or on behalf of the vendor for consumption off the premises of

the vendor, serves or assists in serving, cooks, heats or provides other services with respect to the food or drink; and

(3) in those instances where the sale . . . is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten.

C. With respect to the tax treatment of restaurant food<sup>2</sup> pursuant to Tax Law § 1105(d)(i), the Tribunal, in *Matter of Automatique, Inc.* (Tax Appeals Tribunal, March 4, 1993), stated as follows:

From this language, the Legislature's scheme for the treatment of prepared foods is apparent. Food sold in restaurants or other establishments which provide a combination of prepared food and service is taxed under Tax Law § 1105(d)(i). As the Court stated in *Burger King*, the "purchase of restaurant food is more than the mere receipt of an edible or a potable," but "a delivery of food and service in combination" whether the service is a major portion of the combination as it might be in a gourmet restaurant, or a small portion as it might be at a hot dog stand (*Matter of Burger King v. State Tax Commn.*, 51 NY2d 614, 435 NYS2d 689). In contrast, food of the type and in the form commonly sold in food stores for off the premises consumption is not taxed as "restaurant food." Ordinarily, a supermarket does not supply a service element with food purchased for home consumption because the service elements are intended to be supplied by the consumer.

D. Tax Law § 1105(d)(ii) provides that "the tax *imposed by this subdivision* shall not apply to: (A) food or drink which is sold to an airline for consumption while in flight." (Emphasis added.) The subdivision referred to in Tax Law § 1105(d)(ii) is the sales tax imposed on restaurant food pursuant to Tax Law § 1105(d) and not the sales tax imposed on tangible personal property under Tax Law § 1105(a). Accordingly, it is obvious that the Legislature, in

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<sup>2</sup> The term "restaurant food" was coined by the court in *Matter of Burger King v. State Tax Commn.* (51 NY2d 614, 435 NYS2d 689) in describing food subject to tax under Tax Law § 1105(d).

enacting Tax Law § 1105(d)(ii), clearly intended that food and beverage sold to an airline for in-flight consumption be considered restaurant food pursuant to Tax Law § 1105(d)(ii) and not tangible personal property under Tax Law § 1105(a).

E. Although the above conclusion is, in my view, dispositive of the issue concerning the sales tax classification of food and drink sold to an airline for in-flight consumption, I would also note that the record herein contains substantial evidence to show that there was a significant service element that petitioner provided to its airline customers which, in accordance with the holding in *Matter of Automatique, Inc. (supra)*, would require a finding that the food and drink in question was restaurant food and not tangible personal property. Petitioner, after preparing and then chilling the food, generally packed it in individual serving trays, wrapped the individual trays in color coded foil, placed the trays in each airline's containers along with dry ice to keep the food at a specific temperature and delivered the containers to the airline's aircraft at the airport. Additionally, petitioner provided such accessories as trays, cutlery, tableware and glasses, serviettes, salt cellars and refresher towels. Also, examination of the Polar Air catering sales tickets shows that almost one-third of petitioner's sales were service related charges, thus bolstering the conclusion that there was a substantial service element to petitioner's business activities. There is also considerable evidence in the record in the form of petitioner's own promotional material wherein petitioner consistently refers to its operations as airline catering. Finally, I cannot conclude that petitioner's prepared meals are "in the same form and condition, quantities and packaging" as sold in food stores within the meaning and intent of Tax Law § 1105(d)(i)(3). All of these factors, coupled with petitioner's failure to submit any contract agreements for review, support the conclusions reached herein.

F. Turning next to the issue concerning whether there was a reasonable basis for the Division's issuance of a Notice of Determination to recover a previously issued refund, I conclude that the Notice of Determination had a reasonable basis. The Division's right to recover an erroneous refund is clearly set forth in *Matter of Turner Construction v. State Tax Commn. (supra)* and *Matter of Kensington Gate Owners, Inc. (supra)*. In the instant matter, it is clear that both applications for credit or refund were filed on the same basis and sought the same exemption from taxation by the same taxpayer. Except for a three-month gap from March 1, 2000 to May 31, 2000, the applications for credit or refund cover a continuous period from June 1, 1998 through February 28, 2002, and there is nothing in the applications for credit or refund, or the record before me, to suggest that petitioner's methods and operations changed in any material respect from one period to the other. Under these circumstances, it was rational and reasonable for the Division to issue the Notice of Determination for the period June 1, 1998 through February 29, 2000 based on information it had gathered with respect to the period June 1, 2000 to February 28, 2002.

G. Finally, petitioner's reliance on *Chartair (supra)*, is misplaced. While it is true that the Division cannot resort to a test period audit where a taxpayer maintains complete and adequate books and records, it must be noted that a test period audit methodology was not employed in the instant matter. Petitioner filed an Application for Credit or Refund requesting a refund of \$9,979.60 and the Division granted the request without audit. When the Division later determined through the audit of a subsequently filed Application for Credit or Refund that petitioner was not entitled to the exemption from taxation it was claiming, and had previously claimed, the Division simply issued the Notice of Determination to recover the erroneous refund. There were no indirect audit methods used in determining the tax due asserted in the Notice of

Determination, and, as previously noted, it was rational and reasonable for the Division to utilize information gathered on the later filed Application for Credit or Refund as a basis to issue the Notice of Determination. Accordingly, there was no need for the Division to request and examine books or records for the period covered in the Notice of Determination.

H. The petition of the Gate Gourmet, Inc., f/k/a Dobbs International Services, Inc., is denied and the Division's refund denial dated February 21, 2002 and its Notice of Determination dated February 18, 2003 are both sustained.

DATED: Troy, New York  
December 29, 2005

/s/ James Hoefer  
PRESIDING OFFICER